IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

GEORGE W. CROSSMAN AND HERMAN SIELCKEN, PETITIONERS,

against

WILLIAM BURRILL, JAMES BURRILL, AND OTHERS, OWNERS OF THE BARK "KATE BURRILL," RESPONDENTS.

And now come George W. Crossman and Herman Sielcken, by their proctor, Everett P. Wheeler, and move this honorable court that a writ of certiorari may be issued out of and under the seal of this honorable court, directed to the United States circuit court of appeals for the second circuit, commanding said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said circuit court of appeals in the said cause therein entitled "William Burrill, James Burrill, Israel L. Burrill, Robert Caie, William D. Robertson, and John R. Blauvelt, owners of the bark 'Kate Burrill,' libelants, against George W. Crossman and Herman Sielcken, respondents," to the end that the said cause may be reviewed and determined by this court, as provided in section 6 of the act of Congress entitled "An act to establish circuit courts of appeals, and to define

and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891.

EVERETT P. WHEELER,
Proctor for Petitioners.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1898.

GEORGE W. CROSSMAN and HERMAN SIELCKEN, *Petitioners*,
against
WILLIAM BURRILL, JAMES BURRILL, and OTHERS, *Owners of the Bark "Kate Burrill," Respondents.*

To the Supreme Court of the United States:

The petition of George W. Crossman and Herman Sielcken respectfully showeth:

First. Your petitioners are engaged in business in the city of New York, and are the respondents in the cause heretofore pending in the circuit court of appeals for the second circuit, hereinafter mentioned.

Second. The decree, to review which a writ of certiorari is asked, was rendered by the circuit court of appeals for the second circuit on the 20th day of December, 1898, and reversed a decree of the district court of the United States for the southern district of New York, which dismissed a libel filed by the said William Burrill and others, owners of the bark "Kate Burrill," against your petitioners in a cause of contract, civil and maritime, and which decree adjudged that the said libelants recover from your petitioners the sum of three thousand one hundred and fifty-one dollars, with costs.

Third. The original libel was filed by the said libelants against your petitioners on the 17th day of April, 1894, to recover demurrage alleged in said libel to be due from your

petitioners to the libelants under a charter-party entered into between the said owners of the said bark "Kate Burrill" and your petitioners. The libel was dismissed by the district court, with costs, and the decree dismissing the said libel was entered in said court January 16, 1895. The said libelants appealed from the said decree to the United States circuit court of appeals for the second circuit on the 24th day of January, 1895. In the said circuit court of appeals an order was made granting to the libelants leave to make new allegations in their libel. They did file an amended libel in the circuit court of appeals, and your petitioners answered the said amended libel. Thereupon the libelants filed exceptions to the fourteenth, fifteenth, and sixteenth articles of the said answer, on the ground as to each "that the same is insufficient in the law to constitute a defense." The circuit court of appeals sustained the exceptions to the fourteenth and fifteenth articles of the said amended answer, and overruled the exception to the sixteenth article of said answer. Thereupon certain testimony was taken in the circuit court of appeals, and the cause came on to be heard in the said court, and the decree before mentioned in favor of the libelants against your petitioners was thereupon made by the said circuit court of appeals.

Fourth. The questions raised by the exception to the said fourteenth article of the said answer of your petitioners are purely questions of law. The fourteenth article alleges that under the terms of the charter-party executed between the libelants and your petitioners "the charterers' responsibility was to cease when the vessel is loaded and the bills of lading are signed." It appeared in the pleadings that the vessel proceeded from the port of New York to Pensacola, and entered upon the discharge of the charter, and took on board a full cargo of lumber, which was shipped by the charterers, your petitioners, to Rio Janeiro to consignees who had previously bought the same from your petitioners.

The master signed a bill of lading for the same, which was forwarded to the said consignees in Rio Janeiro. This bill of lading had stamped thereon the words "as per charter-party dated 7th March, 1893." The circuit court of appeals held that, notwithstanding the clause so mentioned, the charterers' responsibility did not cease when the vessel was loaded and bills of lading were signed, on the ground that the bills of lading as signed did not impose upon the cargo a lien for demurrage, pursuant to the terms of the charter-party. The charter-party did in express terms provide: "Vessel to have an absolute lien upon the cargo for all freight, dead freight, and demurrage." Your petitioners are advised and allege that said ruling was erroneous, and that upon a true construction of the charter-party and the bills of lading, which should be construed together, the cargo did remain subject to a lien for demurrage, and that consequently the charterers' responsibility for the demurrage ceased when the lumber was delivered on board and the bills of lading were signed, and it became the duty of the owners of the said bark, the libelants, to collect the said demurrage at the port of consignment, which they failed to do.

Fifth. The questions raised by the exception to the fifteenth article of the said answer of your petitioners are purely questions of law. The fifteenth article alleges—

"that when said vessel arrived at Rio Janeiro, the owners of said cargo used all reasonable diligence in and about receiving the cargo shipped upon the said vessel and removing the same therefrom. That libelants were prevented from discharging the same, and respondents were prevented from receiving the same any sooner than they did, by reason of the act of the public enemy, to wit, certain vessels of war which were then in the harbor of Rio Janeiro, and were engaged in firing upon the forts in said harbor and making war upon the government of Brazil, and that the firing between said vessels of war and the said forts made it impossible to discharge the said cargo or to receive it from the said vessel any sooner than it was discharged or received.

That the said cargo was delivered according to the custom of said port of Rio Janeiro, and that the detention alleged in the libel, if any such there be, was caused by said acts of the public enemy and not by any default of respondents. That the captain of the said vessel and Messrs. Phipps Brothers & Co., the agents of the libelants, acquiesced in said delay and recognized the necessity therefor."

The learned judge of the district court for the southern district of New York held that a similar article in the answer to the libel in the said court constituted a defense to the libel, and on that ground dismissed the said libel. His decision on this point was reversed by the circuit court of appeals, which held that the said article did not constitute a defense to the libel. This was put by that court on the ground that the charter-party contained a contract binding the charterers to pay demurrage at all events in case the cargo was not delivered within the time mentioned in the charter-party, no matter whether the delay was caused by their fault or not, and that the word "default" in the charter-party meant omission from whatever cause and not fault or neglect of duty. Your petitioners are advised and believe that this decision of the circuit court of appeals was erroneous in law, and that the decision of the district court in this particular was correct and should have been affirmed.

Sixth. The circuit court of appeals overruled the exception taken by the libelants to the sixteenth article of your petitioners' answer. This article set up the defense of accord and satisfaction and an account stated between the agents of libelants at Rio Janeiro and the consignees and the payment in full of all amounts due under the charter-party to the libelants. The circuit court of appeals, however, held that upon the proofs this defense was not made out. The proofs, as your petitioners are advised and allege, establish that a claim for demurrage was made by the captain of the "Kate Burrill" at Rio Janeiro, and notified by him both to

the agents of the libelants and to the consignees of the cargo; that the libelants themselves wrote to their agents in Rio Janeiro, calling their attention to the claim for demurrage, either against the government of Brazil or against the consignees of the cargo; that an account was rendered by the consignees of the cargo to the agents of the libelants at Rio Janeiro, purporting to be for all matters due to the vessel; that the balance appearing to be due by this account was paid to and accepted by the agents of the libelants and remitted to their principals, the libelants, and received and retained by them without objection; that no objection to the said settlement was ever filed by them to your petitioners or to the said consignees, and your petitioners are advised and believe that upon these undisputed facts the accounts between the parties were closed, and that there was an accord and satisfaction of all claims under the charter-party, notwithstanding the fact that no specific mention of the claim for demurrage was made in the account so rendered; that there are no allegations in the libel to impeach the said statement of account and accord and satisfaction for fraud or mistake, and that neither fraud nor mistake was proved in the circuit court of appeals.

Seventh. A certified copy of the entire record of the said cause in the said circuit court of appeals is herewith furnished, in conformity with rule 37 of this honorable court relative to cases from the circuit court of appeals.

Eighth. Your petitioners are advised and believe that the said judgment of the said United States circuit court of appeals is erroneous, and that this honorable court should require the said cause to be certified to it for its review and determination and in conformity with the provisions of section 6 of the act of Congress entitled "An act to establish circuit courts of appeals, and to define and regulate in certain cases jurisdiction of the courts of the United States, and

for other purposes," approved March 3, 1891, the said cause being made final in the said circuit court of appeals by the said act.

Wherefore your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this honorable court, directed to the United States circuit court of appeals for the second circuit, commanding said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said circuit court of appeals in the said cause therein entitled "William Burrill and others, owners of the bark 'Kate Burrill,' libelants, against George W. Crossman and Herman Sielcken, respondents," to the end that the said cause may be reviewed and determined by this court, as provided in section 6 of the act of Congress entitled "An act to establish circuit courts of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, or that your petitioners may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said act, and that the said decision of the said circuit court of appeals in the said case and every part thereof may be reversed by this honorable court.

And your petitioners will ever pray, etc.

GEO. W. CROSSMAN,
Per HERMANN SIELCKEN.
HERMANN SIELCKEN.

EVERETT P. WHEELER,
Advocate for Petitioners.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Hermann Sielcken, being duly sworn, says that he is one of the petitioners above named; that he has read the foregoing petition, and the facts therein stated are true, to the best of his knowledge, information, and belief.

HERMANN SIELCKEN.

Sworn to before me this 6th day of January, 1899.

[SEAL.] THORLEIF NIELSEN,
Notary Public, No. 12, *New York County.*

[Endorsed:] Supreme Court of the United States, October term, 1898. George W. Crossman and Herman Sielcken, petitioners, against William Burrill and others, owners of the bark "Kate Burrill," respondents. Motion and petition. Wheeler & Cortis, proctors for petitioners; office and post-office address, 45 Broadway, New York city, N. Y.